

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVE HESSE and ADAM BUXBAUM, on
behalf of themselves and all others similarly
situated,

Plaintiffs,
v.

GODIVA CHOCOLATIER, INC.,

Defendant.

No. 1:19-cv-0972-AJN

DECLARATION OF LAURA BRETT
IN SUPPORT OF CY PRES
RECIPIENT DESIGNATION

I, Laura Brett, declare as follows:

1. I have personal knowledge of the facts in this Declaration and, if called as a witness, I could and would competently testify to these facts.
2. I am a Vice President of BBB National Programs, leading its National Advertising Division (“NAD”). In my role, I am responsible for overseeing NAD in our application of high standards for advertising claim substantiation in its monitoring and investigation of national advertising claims for truthfulness and accuracy, its published dispute resolution decisions that serve as guidance for the industry, and its educational programming, including publications and conferences, in consumer protection law, claim substantiation, and advertising standards. I have been with NAD since 2012, having previously served as a Senior Staff Attorney investigating advertising claims, applying the relevant law and standards, and analyzing substantiation evidence, as Assistant Director, and since 2017 as the leader of NAD.

3. The National Advertising Division was created in 1971 to help reduce the prevalence of deceptive advertising. Originally administered by the Council of Better Business Bureaus (“CBBB”), in 2019 NAD became part of BBB National Programs, in a reorganization that formed this independent non-profit organization as a home to sixteen industry self-regulation programs that set high standards for businesses and provides third-party accountability and dispute resolution services that help ensure a fair marketplace for consumers.¹ By proactively responding to marketplace concerns and setting high standards for business practices in advertising, privacy, consumer protection, and other areas, BBB National Programs creates a better, more trustworthy experience for consumers and a fairer playing field for businesses.
4. The work of BBB National Programs in protecting consumers from misleading advertising was featured at a February 1, 2022 hearing of the Senate Commerce Committee’s Subcommittee on Consumer Protection, Product Safety, and Data Security, “Stopping Covid-19 Fraud and Price Gouging.” BBB National Programs Executive Vice President, Policy, Mary Engle, testified about the organization’s work, including case work by NAD, in reviewing advertising that contained misleading claims that products could prevent, treat, or cure Covid-19, removing the advertising from the marketplace and preventing consumer harm.
5. BBB National Programs’ NAD monitors national advertising in all media and holds advertising to established legal standards, applying guidance set by the Federal Trade Commission (“FTC”). NAD provides a forum for the industry to enforce consistent standards of truth and accuracy for the benefit of consumers and fair competition.

¹ BBB National Programs is organized as a 501(c)(6) not-for-profit organization. It also operates a 501(c)(3) entity, BBB National Programs Charitable Foundation, d/b/a the Center for Industry Self-Regulation.

NAD cases investigate the messages conveyed by advertising claims and the evidence relied upon to support them. Published decisions of its advertising review cases ensure both the consistency and the independence of its case review. NAD's published archive of over 7,000 decisions provides a resource for advertisers as guidance on advertising law principles and claim substantiation, which in turn helps build consumer trust and support fair competition. FTC Commissioner Christine Wilson recently praised NAD, explaining, “[t]here is no doubt that force multipliers like the NAD contribute significantly to the goal of protecting consumers ... Consumers benefit when they can trust that companies' claims are truthful and substantiated, and we greatly appreciate your work to advance this goal.” FTC Commissioner Christine Wilson, remarks on October 5, 2020, BBB National Programs NAD 2020 Conference (virtual).

6. BBB National Programs' NAD reviews advertising in response to complaints from non-governmental organizations, local BBBs and consumers, on its own initiative, or based on challenges from businesses. Its decisions cover a wide variety of industries and issues. NAD's decisions often serve as early guidance in how advertisers should apply advertising law on new or emerging issues in the field, particularly in the ever-changing area of digital advertising and social media.
7. BBB National Programs' NAD further seeks to make advertising more trustworthy for consumers by educating the advertising industry on advertising and marketing law. NAD hosts an annual conference for upwards of 300 leading practitioners. The NAD Annual Conference regularly features representatives from the FTC and other regulators, the bench, academia, and private practice and fosters deep exploration of

how advertising claims should be substantiated and truthfully communicated to consumers. Recent conferences explored issues such as developments in supporting health claims with clinical studies, regulatory and self-regulatory efforts to combat false COVID-19 claims, and guidance on substantiating natural, sustainable and other environmental claims. NAD regularly participates in other educational programming and publishes guidance on issues in claim substantiation, advertising law, and consumer protection. Our team participated in recent FTC workshops on emerging issues, including the “Bringing Dark Patterns to Light” Workshop on April 29, 2021, the Online Ticket Events Workshop, “That’s the Ticket,” on June 11, 2019, and “Competition and Consumer Protection in the 21st Century Hearing #10: Competition and Consumer Protection Issues in U.S. Broadband Markets,” on March 2, 2019.

8. As the United States Court of Appeals for the 9th Circuit noted in its opinion in Dennis v. Kellogg, 697 F.3d 858, 866-67 (9th Cir. 2012), in misleading advertising cases, “...organizations dedicated to protecting consumers from, or redressing injuries caused by, false advertising...” are the most appropriate recipients of *cypres* awards. NAD’s mission and operation fall squarely within this category and are closely related to the false advertising harms alleged in this matter. It directly reviews and investigates advertising claims, including false statement of origin claims, to ensure that false and misleading claims are removed from the marketplace. It further seeks to protect consumers by publishing the reasoning behind those investigations and encouraging all advertisers to utilize that guidance to better their own consumer-facing communications.

9. NAD has been the prior recipient of *cy pres* awards in false advertising cases. In Broomfield v. Craft Brew Alliance, No. 5:17-cv-01027-BLF (N.D. Ca. November 1, 2021), the court approved NAD as one of two recipients in a class action that alleged the defendants falsely advertised the origin of Kona beer so that consumers believed they were brewed in Hawaii. In Rawa v. Monsanto, No. 4:17CV01252, 2018 WL 2389040 (E.D. Mo. May 25, 2018), the court approved the NAD as a *cy pres* recipient, noting that it “monitors national advertising in all media for goods and services, enforce[es] high standards of truth and accuracy, and accepts complaints from consumers.” The court in Graves v. United Indus. Corp., No. 2:17-cv-06983-CAS-SKx, 2020 WL 953210, at *7 (C.D. Cal. Feb. 24, 2020), approved NAD, applying the same reasoning. CBBB, the former administrator of NAD, was named as a *cy pres* recipient in Anthony v. Yahoo, No. C 05 04175 RMW (N.D. Cal. June 18, 2007), a case concerning a breach of the implied covenant of good faith and fair dealing and negligent misrepresentation with respect to Yahoo’s online dating service. Similarly, CBBB was approved as a *cy pres* recipient in Beck-Ellman v. Kaz, No. 3:10-CV-02134-H-DHB (S.D. Cal. June 11, 2013), stating that CBBB was an appropriate recipient having demonstrated “its dedication to protecting consumers from injuries caused by false advertising.” Most recently the court in Jones. v. Monsanto, No. 19-0102-CV-WBP (W.D. Mo. 2021) similarly approved NAD as a *cy pres* recipient.

10. BBB National Programs’ NAD has also utilized *cy pres* awards to develop customized advertising review programs that create an even closer nexus to underlying alleged false advertising harm. NAD worked with the Council for

Responsible Nutrition's Foundation to create a dedicated monitoring program focused on addressing misleading advertising in the dietary supplement industry. Over the resulting 12-year partnership, NAD issued over 350 decisions related to advertising in that industry, raising the industry's awareness of their obligations to support their advertising claims with reliable evidence and improving the information consumers were provided about this product category.

11. Funds received from the *cy pres* award will be used only to support our work addressing false advertising.
12. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this day of 1st day of April 2022, at 12:00 PM.



Laura Brett